DEC 10 2003

No. 03-218

In The

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

THE AMERICAN CIVIL LIBERTIES UNION, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.

in support of the *Petitioner*

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INTEREST OF AMICUS[1]

WallBuilders, Inc. is dedicated to educating the American public about the proper exercise of rights under the First Amendment. In this capacity, WallBuilders, Inc. is gravely concerned that the unregulated distribution of material that is harmful to minors is not within the proper exercise of First Amendment rights and believes that COPA is a necessary safeguard on the otherwise-pervasive reach of the Internet.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit, in its holding on remand, erred in determining that the Child Online Protection Act, 47 U.S.C. § 231 (2000) (hereinafter "COPA"), will likely be found unconstitutional. *ACLU v. Ashcroft,* 322 F.3d 240, 271 (3d Cir. 2003). The Third Circuit found that application of the "community standards" requirement in effect eviscerates the limitations that Congress crafted in attempting to limit COPA's reach. It does so, according to the Third Circuit, by subjecting an already-broad statute to potential scrutiny in the most conservative community in which a particular Web publication might happen to be accessed. *Id.* The Third Circuit, however, overlooked a narrowing construction to which COPA is readily susceptible. The phrase at issue, "contemporary community standards," can be construed to mean the "contemporary community standards of the community of the *creator* of the material." This construction is allowable under canons of construction articulated by this

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[1] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

and other courts. When so construed, the Third Circuit's concern that Web "publishers would necessarily be compelled to abide by the 'standards of the community most likely to be offended by the message,'" *Reno v. ACLU*, 217 F.3d 162, 177 (3d Cir. 2000) (citation omitted), vanishes.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN PRESUMING THAT COPA'S "COMMUNITY STANDARDS" PROVISION IS NOT READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION.

In *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), the Third Circuit Court of Appeals upheld the district court's granting of a preliminary injunction against the enforcement of COPA. Crucial to the Third Circuit's holding was its determination that the ACLU would likely prevail on the merits by showing COPA's unconstitutionality. *Id.* at 271. Central to this determination was the Third Circuit's conclusion that variations in community standards to which a Web publisher might be subjected under COPA would "exacerbate[]" COPA's scope and render the statute fatally overbroad. *Id.* at 270-71. For the reasons set forth below, Amicus respectfully believes that the Third Circuit's concern for variations in community standards is unwarranted, and this brief will address this one issue.

Amicus understands that under the questions left open by this Court's ruling in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), and the Third Circuit's analysis of those questions on remand, the resolution of the construction of "contemporary community standards" will not be sufficient by itself to uphold COPA as constitutional. Amicus believes, however, that its suggested narrowing construction of "contemporary community standards" *in conjunction with* the arguments

made by Petitioner regarding COPA's other key terms (including "harmful to minors," "as a whole," "minors," and "commercial purposes") and regarding COPA's affirmative defenses is sufficient to uphold COPA's constitutionality. (Petition for a Writ of Certiorari at 16-22.)

In its first review of COPA, *Reno v. ACLU,* 217 F.3d 162, 178 (3d Cir. 2000), the Third Circuit rejected the government's argument that COPA's phrase "contemporary community standards" could mean an "adult community" rather than a "geographic community" as it did in *Miller v. California*, 413 U.S. 15 (1973). However, in so doing, the Third Circuit presumed that Web "publishers would necessarily be compelled to abide by the 'standards of the community most likely to be offended by the message.'" *Reno*, 217 F.3d at 177 (citing *Reno v. ACLU*, 521 U.S. 844, 877-78 (1997)). The Third Circuit thus presented a false dichotomy. Agreeing with the government's position or deciding that the contemporary community standards had to be those of the community of the recipient are not the only two choices.

Under standard canons of construction for facial overbreadth challenges, there is another narrowing construction that should be adopted and which would save COPA. COPA can be narrowed by construing the phrase "contemporary community standards" to mean the standards of the community of the creator of the material COPA seeks to proscribe. This construction is particularly important in light of the Third Circuit's concern on remand about the "exacerbating" or compounding effect of "the contemporary community standards" definition and about COPA's other putative problems. *Ashcroft v. ACLU*, 322 F.3d at 270. As will be demonstrated below, the Third Circuit was simply incorrect in its assertion on remand that a narrowing construction is unavailable. *See, id.* at 270-71.

Furthermore, the suggested narrowing construction is

not rendered in any way untenable by anything in this Court's various opinions in *Ashcroft v. ACLU*, 535 U.S. 564 (2002). Even though the Third Circuit erroneously concluded that no narrowing construction was available, it did correctly realized on remand that it had an on-going obligation to seek such a construction. *ACLU v. Ashcroft*, 322 F.3d at 270-71. In other words, no authoritative construction was determined by this Court when the case was first before it. Furthermore, the suggested narrowing construction—at least arguably—meets the concerns raised in each of the opinions issued by members of this Court.

II. COPA'S "COMMUNITY STANDARDS" PROVISION IS READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION BECAUSE THE PROPOSED CONSTRUCTION IS REASONABLE, IS BASED ON AN AMBIGUITY IN THE PHRASE, AND DOES NOT REQUIRE THIS COURT TO DRAW ANY LINES THAT CONGRESS HAS LEFT UNDRAWN.

As the Third Circuit recognized on remand, *id.* at 270, this Court, in *ACLU v. Reno*, 521 U.S. 844, 884 (1997) (herein after "the CDA case"), stated that it could construe a statute narrowly if it were readily susceptible to such a construction. COPA'S "community standards" provision is indeed susceptible to such a construction. This Court indicated that a statute would be readily susceptible to a narrowing construction when "the text or some other source of congressional intent identified a clear line that this Court could draw." *Id.* Other courts have expressed the same position. The Tennessee Supreme Court, for example, has

indicated that textual ambiguity (but not vagueness)[2] can serve as an indication that a text is readily susceptible to a narrowing construction. *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993). Likewise, at least one federal court has gone so far as to state that *any* reasonable reading should be accepted to save a statute from a facial overbreadth challenge, even if it is one of several possible conflicting readings. *Rhode Island Med. Society v. Whitehouse*, 66 F. Supp. 2d. 288 (D.R.I. 1999). Under any of these approaches, COPA's "community standards" provision is susceptible to a narrowing construction since the proposed construction is reasonable, is based on an ambiguity in the phrase, and does not require this Court to draw any lines that Congress has left undrawn.

A. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" is reasonable.

COPA can be narrowed by construing the phrase "contemporary community standards" to mean the standards of the community of the creator of the material COPA seeks to proscribe. There is no reason why the language must be construed to mean the community of the recipient rather than the community of the creator. If the creator is subject only to the standards of his or her own community, the Third Circuit's concern vanishes, as do those of expressed by various members of this Court when this case was first before it.

This construction is a reasonable one. In *Rhode Island Medical Society*, the court was discussing the

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[2] The Third Circuit's vagueness concerns were not directed at the "contemporary community standards" language. *See ACLU v. Ashcroft*, 322 F.3d at 266-69.

construction of a state, not a federal, statute. However, its comments on reasonableness were properly derived from this Court's cases dealing with both types of statutes and are germane here. The *Rhode Island Medical Society* court, in determining that every reasonable construction must be considered, relied upon a more general statutory canon of this Court and simply applied it in the context of a facial overbreadth challenge. The canon it relied upon was that courts must apply *any* reasonable construction that would be constitutional. In reaching that determination, the *Rhode Island Medical Society* court, 66 F. Supp. 2d at 306, quoted this Court's opinion in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building. & Construction Trades Council*, 485 U.S. 586, 575 (1988) for this proposition: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." The *DeBartolo* Court, in turn, relied upon no fewer than nine cases in support of this canon of construction, *id.* at 575, including *Hooper v. California*, 155 U.S. 648, 657 (1895). The *DeBartolo* Court quoted *Hooper* for the proposition that "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[3] Thus, the *Rhode Island Medical Society* court's approach is consistent with this Court's own approach.

In *Rhode Island Medical Society*, the court was concerned that none of the competing narrowing constructions offered in defense of Rhode Island's partial birth abortion statute were reasonable because they all

[3] Although he advocated a different solution (the adoption of a national adult community standard), this same "elementary rule" animated Justice Breyer's opinion. *Ashcroft v. ACLU*, 535 U.S. at 589-90 (Breyer, J., concurring).

involved reading complex medical procedures or distinctions into the statute. 66 F. Supp. 2d at 306-07. In the instant case, by contrast, nothing need be read into the statute except a single prepositional phrase—"of the creator's community"—needed to clarify a single patent ambiguity. COPA's text, including the definitional sections, leaves completely unanswered the question, "From which community do the contemporary community standards derive?" It is certainly reasonable to answer that the community should be the community of the creator of the material. This completely eliminates the Third Circuit's concern that "every Web publisher subject to the statute [would be required to] abide by the most restrictive and conservative state's community standards . . . " *ACLU v. Ashcroft*, F.3d at 270.

. Neither is this approach undercut by this Court's statement in *DeBartolo* that, "the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575. The approach is not undercut for the simple reason that Congress' intent cannot be determined. As the Third Circuit noted in *Reno v. ACLU*, 217 F.3d 162, 174-75, Congress claims, on the one hand, to have intended to incorporate the *Miller* standards—which are clearly geographically based—and, on the other hand, to have intended to reject *Miller's* geographically based standards in lieu of an "adult" standard. By thus expressing two mutually exclusive intentions, Congress made its real intention undiscernible. It was for this same reason that this Court refused to be bound by one of Congress' two purported intentions when it evaluated the constitutionality of the CDA in the CDA case. *Reno v. ACLU,* 521 U.S. at 874, n.39 (citation omitted)

In that case, this Court stated that "[t]he CDA, which implements the 'contemporary community standards' language of *Miller,* thus conflicts with the Conferees' own

assertion that the CDA was intended 'to establish a uniform national standard of content regulation.'" *Id.*

This same ambiguity was also recognized by various members of this Court when COPA was before it previously. For example, Justice Kennedy, joined by Justices Souter and Ginsburg wrote:

> Justice Breyer would alleviate the problem of local variation in community standards by construing the statute to comprehend the "Nation's adult community taken as a whole" . . . . There is one statement in a House Committee Report to this effect, "reflecting," Justice Breyer writes, "what apparently was a uniform view within Congress." The statement, perhaps, reflects the view of a majority of one House committee, but there is no reason to believe that it reflects the view of a majority of the House of Representatives, let alone the "uniform view within Congress."
>
> In any event, we need not decide whether the statute invokes local or national community standards to conclude that vacatur and remand are in order.

Ashcroft v. ACLU, 535 U.S. at 595 (Kennedy, J., concurring in the judgment).

Thus, under the *Rhode Island Medical Society/DeBartolo/Hooper* approach, COPA is readily susceptible to a narrowing construction whereby "contemporary community standards" is construed to mean the standards of the community of the creator of the material.

B. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" is based upon an ambiguity in one phrase.

As is evident from the discussion above, the same line of reasoning indicates that COPA is readily susceptible to the recommended narrowing construction under the Tennessee Supreme Court's alternate approach to determining ready susceptibility. In *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993), the Tennessee Supreme Court declared that an ambiguity in a key term in a statute rendered it readily susceptible to a narrowing construction. Thus, for all the reasons stated above, COPA's ambiguity regarding which community's standards are to be employed renders it readily susceptible to a saving narrowing construction.

C. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" does not require this Court to draw any lines that Congress left undrawn.

Finally, under the standard articulated by this Court in the CDA case, 521 U.S. at 884, COPA is also susceptible to this narrowing construction. There, this Court declared that a statute is not readily susceptible to a narrowing construction if the Court would be called upon to "'draw one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn' because doing so 'involves a far more serious invasion of the legislative domain.'" *Id.* (quoting *United States v. Treasury Employees*, 513 U.S. 454, 479, n.26 (1995)).

Here, this Court would not have to draw any lines whatsoever. As the Third Circuit has acknowledged from the

beginning, when Congress enacted COPA, it was specifically attempting to address this Court's concerns about the CDA. *Reno v. ACLU*, 217 F.3d at 167. COPA "restrict[s] its scope to material on the Web rather than on the Internet as a whole; [ ] target[s] only those Web communications made for 'commercial purposes'; and [ ] limit[s] its scope to only that material deemed 'harmful to minors'." *Id.* (footnotes omitted). Thus, the lines have all been drawn in other portions of COPA's language. An exhaustive reading of all the opinions issued by this Court when COPA was previously before it shows that no member of this Court was concerned that adopting *any* of the suggested constructions of "contemporary community standards" would involve impermissible line drawing.

Thus, in sum, COPA is readily susceptible to a narrowing construction because the construction suggested is reasonable and all reasonable constructions must be adopted; because the ambiguity of a key term is an indication that the statute is readily susceptible to a narrowing construction; and because this Court is not called upon to draw any lines that Congress failed to draw.

III. STATUTORY AND CASE LAW SUPPORT EXISTS FOR CONSTRUING "CONTEMPORARY COMMUNITY STANDARDS" TO MEAN THE "CONTEMPORARY COMMUNITY STANDARDS OF THE COMMUNITY OF THE CREATOR" AND NO GOOD REASON EXISTS TO REJECT THE CONSTRUCTION.

As Justice Kennedy, joined by Justices Souter and Ginsburg, pointed out, under 18 U.S.C. § 3237 (2000), venue will lie in the community of creation and not merely in the community of receipt. *Ashcroft v. ACLU*, 535 U.S. at 601-02 (Kennedy, J., concurring in the judgment). Furthermore,

courts have explicitly held that in applying *Miller's* "contemporary community standards," the relevant standards can be those of the community of creation. *See, e.g., United States v. Cohen,* 583 F.2d 1030, 1040-41 (8th Cir. 1978) (mailed obscenity); and *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996) (electronic bulletin board obscenity). Interestingly, the Third Circuit discussed the *Thomas* case and even discussed some aspects of its treatment of the two communities in *Reno v. ACLU*, 217 F.3d at 176, yet failed to consider *Thomas'* insights as a basis for a narrowing construction.

Therefore, adopting the suggested construction is permissible *and* would alleviate the concerns otherwise generated by multiple possible venues, *see Ashcroft v. ACLU*, 535 U.S. at 601-02 (Kennedy, J., concurring in the judgment). Should "contemporary community standards" be construed to mean the contemporary community standards of the community of creation, prosecutions would likely be brought in the venue of creation and employ that community's standards. Should, for some reason, a prosecution be initiated in a venue of receipt, evidence could be introduced as to the contemporary community standards of the community of origin.

Furthermore, adoption of this construction meets an objection raised by this Court in *Reno v. ACLU*, 521 U.S. at 878, and re-raised by Justice Kennedy in *Ashcroft v. ACLU*, 535 U.S. at 594. This Court was worried about "a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material 'indecent' or 'patently offensive,' if the college town's community thought otherwise." Adopting the narrowing construction of "contemporary community standards" suggested here completely eliminates this concern.

It is important to note that the government's failure to

raise the argument of this narrowing construction is no impediment to this Court entertaining the argument. First, as noted above, this Court has previously declared that "*every* reasonable construction *must* be resorted to . . . ." *Hooper v. California*, 155 U.S. 648, 657 (1895) (emphasis added). "Every" is not limited to those that are raised by a party. Second, this Court has explicitly stated that it will, in its discretion, entertain issues and arguments raised only in amicus briefs. *Davis v. United States,* 512 U.S. 452, 457, n.* (1994); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion).

CONCLUSION

For the foregoing reasons, among others, the Third Circuit's conclusion that the ACLU would likely succeed on the merits is erroneous and, thus, it should not have affirmed the district court's order issuing a preliminary injunction. Therefore, this Court should reverse the decision of the Third Circuit.

Respectfully submitted
this 10th day of December, 2003.

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